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No. 96-929

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

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CECILIA YIN, *Petitioners*,

v.

STATE OF CALIFORNIA; DARYLL TSUJIHARA; LINDA NICHOLSON; ROBERT CATALE; and TONY SUNSERI, *Respondents*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a prolonged history of excessive absenteeism having a substantial and injurious impact on job productivity and overall job performance falls within the ambit of the business necessity exception to the prohibition against medical examinations as set forth in the Americans With Disabilities Act.

2. Whether the search and seizure provisions of the Fourth Amendment to the United States Constitution prohibit an employer-required medical examination under the circumstances of this case.

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## INTRODUCTION

Respondents State of California, Daryll Tsujihara, Linda Nicholson, Robert Catale and Tony Sunseri respectfully request that this Court deny the petition for Writ of Certiorari filed by petitioner Cecilia Yin and decline to review the subject opinion of the United States Court of Appeals for the Ninth Circuit on the grounds that the opinion does not present any unusual question of federal law for this Court to resolve and further does not conflict with any prior decision of this Court or with any decision of any other Court of Appeal on the same matter.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 95 F.3d 864 (9th Cir. 1996) and is reproduced in Appendix A of

petitioner's brief. The opinion and order of the District Court is reproduced in Appendix B of petitioner's brief.

## STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Americans With Disabilities Act, 42 U.S.C. §12112(d)(4)(A):

> "A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

## STATEMENT OF THE CASE

As aptly expressed by the Ninth Circuit, this case presents the question of "whether a state may compel an employee with a prolonged and egregious history of absenteeism and a record of on-the-job illnesses to undergo a fitness-for-duty medical examination" without violating either the Americans With Disabilities Act ("ADA") or the Fourth Amendment to the United States Constitution. *Yin v. California*, 95 F.3d 864, 866 (1996).

Petitioner at all times relevant to this action was employed as a senior tax auditor with respondent State of California's Employment Development Department ("Department").[1] Contrary to petitioner's representation in her Statement of the Case, the medical examination requirement at issue in this litigation did not arise out of an isolated episode of on-the job illness (see Petition at 2). Petitioner had a history of five years of increasingly excessive absenteeism in which she compiled illness-related absences at a rate ranging from two and a half times that of the average employee in her job classification in 1989 and 1990 to five and six times that of her co-workers in 1992 and 1993, the last two years prior to the onset of the instant litigation. In 1993, she missed almost four full months of work. Needless to say, her numerous absences had a negative effect on her overall productivity, as measured both by the number of audits performed and tax liability found. *Id.* at 867-868.

Within this context, and after repeated episodes of on the job illness, including one episode in April, 1993 where petitioner had to be rushed to the hospital in an ambulance from work (*Id.* at 872), petitioner's supervisors requested access to her medical records for the purpose of evaluating her ability to perform the full range of her

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1. Other named respondents are Department supervisorial and management personnel.

job responsibilities. Petitioner refused, all the while continuing to use significant amounts of sick leave. The Department then asked her to submit to an Independent Medical Examination ("IME"), authorized by state statute and by the union contract governing Yin's terms and conditions of employment. *Id.* at 867, 871. Petitioner again refused and twice failed to show up at scheduled IME appointments. The Department later withdrew its IME request after petitioner's condition apparently stabilized. However, petitioner again began to miss significant amounts of work due to illness in the late fall and early winter months of 1993, including at one point a stretch of almost 30 continuous days. Petitioner continued to refuse to release requested medical information to her employer. An IME requirement was reimposed 1994 following yet another episode of on-the-job illness in early January, 1994.[2/] *Id.* at 867. Thereafter, petitioner filed an action in federal court for injunctive relief and damages, alleging that the Department's actions both in requesting a medical release and in requiring an IME examination violated both the ADA and her right to privacy under the United States Constitution.

The District Court granted respondents' motion for summary judgment on the grounds that the disputed IME plainly fell within the statutory business necessity exception to the ADA's prohibition against required medical examinations and that the medical examination in question did not violate petitioner's Fourth Amendment rights. The Ninth Circuit affirmed, holding that when health problems have a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if

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2. Petitioner has never produced any evidence that her illness on that day was related to her menstrual cycle despite a specific invitation at oral argument to do so.

the examination might disclose whether the employee is disabled or the extent of any disability. In so holding, the Ninth Circuit cited to the business necessity exception to section 12112(d)(4)(A) of the ADA. *Id.* at 868-869. The Court of Appeals' opinion also squarely rejected petitioner's contention that under this Court's precedent decisions the Department's IME requirement constituted a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures or that the Fourth Amendment's warrant requirement applied. *Id.* at 869. This petition followed.

## REASONS FOR DENYING THE WRIT

This case does not present an important federal question for this Court to resolve. Rather, as a matter of statutory interpretation it involves nothing more than a relatively simple, wholly fact-specific application of a well-delineated business necessity exception to certain statutory requirements and prohibitions set forth in the ADA. Moreover, contrary to petitioner's contentions, this case in no way conflicts with any prior Fourth Amendment decisions of this Court. Instead it falls well within guidelines enunciated in a long line of cases defining privacy issues in the context of compelled medical examinations. Nor is there any conflict with the recent Tenth Circuit case cited by petitioner in her effort to obtain review. Respondents respectfully submit that the writ should be denied.

## ARGUMENT

### I.

### THIS CASE INVOLVES NOTHING MORE THAN THE SIMPLE FACT-SPECIFIC APPLICATION OF A STANDARD BUSINESS NECESSITY EXCEPTION TO REQUIREMENTS AND PROHIBITIONS SET FORTH IN THE ADA

The ADA was enacted in 1992 with the general purpose of eliminating discrimination against individuals with disabilities. 42 U.S.C. §12101(b).[3] It incorporates by reference applicable standards and legal precedents governing its predecessor act, the Rehabilitation Act of 1973.[4] §§12133, 12201(a). Provisions governing employment are set forth in Title I of the ADA. Title I bars discrimination in employment against disabled individuals in entities having 15 or more employees. Sections 12111(5), 12112. Section 12112 provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual...." Section 12112(d)(4)(A) includes a specific prohibition against medical inquiries and compelled medical examinations in this context. It provides in pertinent part that an employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of the disability, unless

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3. Henceforth, all section references are to Title 42 of the United States Code unless otherwise specified.

4. Section 504 of the Rehabilitation Act barred discrimination in employment against handicapped individuals in federally funded programs and activities.

such examination or inquiry is shown to be job-related and consistent with business necessity" (emphasis added).

Both the District Court and the Court of Appeals below assumed for purposes of analysis that the challenged medical examination was subject to section 12112(d)(4)(A) because they viewed the Department's inquiry as one to ultimately determine whether petitioner was capable of performing the full range of her job responsibilities. *Yin*, *supra*, 95 F.3d at 867-868. Both Courts then concluded, based on a review of the undisputed record, that the proposed medical examination was both job-related and consistent with business necessity because petitioner's excessive absenteeism had a pronounced negative effect on her own productivity and job performance and that of her office as a whole. *Id.*, see n. 6.[5/] The Ninth Circuit therefore held that when health problems have had a substantial and injurious impact on an employee's job performance, an employer can require that employee to undergo a physical examination to determine his or her ability to work, even if such examination might disclose the presence of or extent of a disability, assuming that the ADA applies. *Id.* at 868-869.

Petitioner contends that this interpretation of the ADA's business necessity exception would "swallow the rule". Petition at 4-5. In her view, the business necessity exception must be limited to technical physical requirements for specific safety sensitive occupations. *Id.* Petitioner is wrong. Section 12112(d)4(B) specifically sanctions employer inquiries as to "the ability of an employee to perform job-related functions." The

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5. Petitioner's argument as to the amount of leave time provided by the state (Petition at 5, n. 3) is therefore irrelevant; moreover, the undisputed record below indicates that she routinely exhausted all of her sick leave as well as vacation leave in lieu of sick leave and in addition was routinely docked for her use of yet more sick leave.

interpretive gloss provided by regulation clearly and specifically permits medical examinations and inquiries of current employees so long as they are job-related and consistent with business necessity and are not conducted for any prohibited purpose.[6/] Thus, as the legislative history makes clear, what is prohibited is an inquiry or examination that is not job-related but merely serves to stigmatize. House Labor Report, H.R. Rep. No. 644, 101st Cong.2d Sess. pt. 1 (1990) at 75. See discussion in *Yin*, *supra*, 95 F.3d at 868, n. 7. There is no such suggestion of stigma here. As noted, by the Ninth Circuit, "[t]here is nothing in the record to suggest that her supervisors were simply trying to discover whether she suffered from a particular disability or that they harbored either a special bias against individuals with a given disability or a general bias against all persons with disabilities." *Id.* at 863. Further, and contrary to

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6. See 29 C.F.R. §1630 (b) ["Except as permitted by §1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability."]; 29 C.F.R. Pt.1630 App. §1630.13(b) ["The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity."]; 29 C.F.R. §1630.14(c) ["A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions."]; 29 C.F.R. Pt.1630 App. §1630.14(c) ["This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job."].

petitioner's contention, Petition at 5, the cited regulations do not limit the application of the business necessity exception to safety sensitive occupations.[7]

Indeed, the plain language of the ADA and its regulations invites inquiries as to job-relatedness, business necessity, and, where applicable, the existence or non-existence of a prohibited discriminatory purpose. Each of these inquiries is fact-specific. As noted, in this instance the undisputed record clearly established as a factual matter all three factors which would permit a medical examination in this instance. Thus, the Ninth Circuit found, as a matter of fact, that petitioner's absenteeism in and of itself, irrespective of its cause, "had taken a serious and deleterious toll on her productivity and overall job performance." *Yin*, *supra*, 95 F.3d at 863. In addition, as noted immediately above, the Ninth Circuit found absolutely no indication of a prohibited purpose. To the contrary, "there is no doubt that Yin's supervisors' ultimate purpose was only to try to determine whether Yin was capable of doing her job." *Id.*

Thus, contrary to petitioner's contention that the Ninth Circuit opinion would "gut" the protections provided by the ADA, this case simply reaffirms the uncontroversial proposition that the absence of business necessity and/or the existence of a prohibited discriminatory purpose must be established as a factual matter. In this case, petitioner utterly failed to do either, as two courts below, after fully reviewing the record, have already established. There is no important federal question for this Court to decide.

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7. A part of App. §1630.14(c) does refer to federal safety regulations and standards governing bus and truck drivers as well as pilots and other air transportation personnel, but such standards are not at issue in this lawsuit.

## II.

## THE NINTH CIRCUIT OPINION WHOLLY COMPORTS WITH A LONG LINE OF PRIOR DECISIONS IN THIS COURT INTERPRETING FOURTH AMENDMENT REQUIREMENTS IN THE CONTEXT OF COMPELLED MEDICAL EXAMINATIONS

### A. The Ninth Circuit's Conclusion That The IME Requirement Did Not Violate Petitioner's Fourth Amendments Rights In No Way Conflicts With This Court's Prior Decisions

Contrary to petitioner's contentions, the Ninth Circuit's decision falls squarely within the ambit of well-established precedent applying a balancing test in place of a warrant requirement to compelled medical examinations to determine whether the Fourth Amendment prohibition against unreasonable searches and seizures has been violated. *Yin*, *supra*, 95 F.3d at 869.

#### 1. The Court Of Appeals Dispensation Of A Warrant/Probable Cause Requirement Falls Wholly Within Guidelines Established By This Court

As noted by the Ninth Circuit, courts have long since dispensed with the warrant and probable cause requirements when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.*, citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). See discussion in *Vernonia School Dist. 47J v. Acton*, 115 S.Ct. 2386, 2390-91 (1995) [ultimate measure of constitutionality of given search is reasonableness; if search is undertaken by law enforcement officials to discover evidence of

criminal wrongdoing, reasonableness generally requires search warrant supported by probable cause; otherwise reasonableness is judged by balancing intrusion on Fourth Amendment interests against promotion of legitimate government interests, citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)].

Petitioner would limit the "special needs" exception to the warrant/probable cause requirement to the narrow range of circumstances prescribed by Skinner [safety sensitive drug and alcohol testing of railroad employees] or *Vernonia*, *supra*, [random drug testing of high school athletes]. Petition at 6. Her analysis belies the reasoning of the *Skinner* court itself, which referenced a wide range of non-drug related searches in which this Court applied a balancing test to its Fourth Amendment analysis of the search at hand. *Skinner*, *supra*, 489 U.S. at 619-620, citing *Griffin*, *supra*, 483 U.S. at 873 (search of probationer's home); *New York v. Burger*, 482 U.S. 691, 699-703 (1987) (search of highly regulated businesses); *O'Connor v. Ortega*, 480 U.S. 709, 721-725 (1987)(work-related search of employee office and desk); *New Jersey v. T.L.O.*, 469 U.S. 325, 337-342 (1985) (search of student property by school officials); *Bell v. Wolfish*, 441 U.S. 520, 558-560 (1979) (search of prison inmate body cavities). Petitioner's contentions notwithstanding, the medical examination at issue here falls well within the perimeters delineated in these and subsequent cases. Indeed, as indicated below, the search in this case is based on a particularized suspicion and therefore is exempt from some of the constitutional implications of the random, suspicionless drug searches authorized in both *Skinner* and *Vernonia*.

## 2. The Ninth Circuit's Well-Reasoned Analysis Properly Applied The Balancing Test

Under a balancing test, the Court determines if a search falls within the reasonableness requirement of the Fourth Amendment by weighing the individual's interest in privacy against the government's interest in the search. *Yin*, *supra*, 95 F.3d at 870. Contrary to petitioner's contentions, neither a least restrictive means nor a compelling state interest standard applies. *Id.*; see also *Vernonia*, *supra*, 115 S. Ct at 2394-2396. Here, the Ninth Circuit, citing appropriate case law, plainly sanctioned petitioner's Fourth Amendment privacy interest in the proposed medical examination but also found that her expectation of privacy was sharply diminished by her status as an employee, by the existence of a state statute sanctioning the exact type of medical examination imposed by petitioner's union contract which essentially incorporated the terms of the statute and by petitioner's history of excessive absenteeism. *Yin*, *supra*, 95 F.3d at 870-872. It then balanced the government interest in a stable and productive workforce, which it termed "substantial and weighty", *id.* at 873, against petitioner's diminished expectation of privacy and her "egregious" attendance record and its effect on office productivity and morale, which it termed "serious and deleterious", *Id.* at 868. Weighing these factors, the Ninth Circuit found the IME requirement to be reasonable and therefore constitutional. *Id.* at 873. Despite petitioner's protestations, this analysis unquestionably falls entirely within perimeters established by this Court in numerous prior cases.

Petitioner also argues that the medical examination at issue was not sufficiently "narrowly tailored" to further the state's "purported" interest and therefore could not pass constitutional muster. Petition at 9. As this Court has noted, the purpose of a warrant

requirement is to assure citizens that the search is authorized by law and narrowly limited in its objectives and scope and to protect citizens from random and arbitrary searches. *Skinner, supra*, 489 U.S. at 622. Here these purposes are wholly met. As set forth at length above, this search is sanctioned by state and federal statute as well as by this Court's interpretation of the reach of the Fourth Amendment. As to objectives and scope, as the Court of Appeals noted, the record is clear that generalized attendance requirements and sick leave policies had obviously failed to deal with the worksite problems arising from petitioner's "egregious" attendance record and on-the-job episodes of illness and their effect on her productivity and job performance. Accordingly, a particularized review of her current health status and medical history was ordered to determine if she was fully capable of performing her job responsibilities at an appropriate level. This search was nothing if not "narrowly tailored." And while petitioner contends that the contemplated examination was "highly intrusive", Petition at 7, it is well-established that a commonplace test[8/] performed reasonably and according to standard medical practices does not constitute any undue invasion of privacy. *Schmerber v. State of California*, 384 U.S. 757, 767-768 (1966).

In short, petitioner's arguments notwithstanding, the Ninth Circuit's opinion in this matter wholly comports with this Court's prior decisions in determining the reach of Fourth Amendment protections in the context of compelled medical examinations.

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8. The record is clear that the examination at issue consisted of a standard physical examination based on a pre-established format.

**B. The Ninth Circuit's Decision In No Way Conflicts With The Tenth Circuit Decision Cited By Petitioner**

Petitioner contends (without page citation) that the "Ninth Circuit's approach is in direct conflict with that of the Tenth Circuit", citing *Rutherford v. Albuquerque*, 77 F.3d 1258 (10th Cir. 1996). Petition at 7.

In *Rutherford*, a city employee fired after a positive drug test challenged the validity of the test on Fourth Amendment grounds (among others). The Tenth Circuit Court of Appeals, applying the same well-established balancing test set forth in *Skinner* and its progeny, narrowly upheld the employee's Fourth Amendment challenge based on the specific circumstances surrounding the testing and declined to reach the broader question of the validity of the suspicionless drug test itself. *Rutherford, supra*, 77 F.3d at 1261. Based on findings that the drug testing policy was initiated during a time that the employee was on medical leave and further that the policy was improperly applied as to him, the Court of Appeals concluded that the test was unacceptably intrusive to the employee's reasonable expectation of privacy. Not only did he receive no advance warning of the test itself, the authorizing enactment on its face did not even apply to him. *Id.* at 1259, 1261. This lack of notice was dispositive to the Tenth Circuit's finding that the test was unacceptably intrusive to appellant's reasonable expectation of privacy. *Id.* at 1262 (citing this Court's identification of advance notice as a factor that minimized the testing program's intrusion on privacy in *Treasury Employees v. Von Raab*, 489 U.S. 656, 672, n.2 (1989).).

Here, in stark contrast, petitioner had ample notice of the disputed examination, not only by way of particularized notice by defendant and respondent Daryll Tsujihara, the Department's Personnel Director, but also by way of the generalized policy permitting such fitness for

duty determinations as set forth in both a state statute and in petitioner's collective bargaining agreement. Moreover, as an examination of the Ninth Circuit decision plainly reveals, the reach of the statutory and union contract enactments closely parallels that of the ADA provision authorizing such medical examination.[9/] Finally, of course, petitioner herself repeatedly put her health status at issue by her well-documented excessive use of sick leave, her repeated on-the-job episodes of illness and her declining productivity, areas of legitimate concern to her employers. Id. at 872. In other words, the facts in this case clearly support the Ninth Circuit's conclusion upholding the search.

Contrary to petitioner's contention, the Ninth Circuit's approach is identical with that of the Tenth Circuit.[10/] Both Courts applied the balancing test

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9. Compare Cal. Govt. Code §19253.5, cited in *Yin*, *supra*, 95 F.3d at 871, n. 14 ["..appointing power may require ...a medical examination...to evaluate the capacity of the employee to perform the work of his or her position"]; applicable provisions of the collective bargaining agreement, see id. at 872, n. 17 [ "a. Whenever the State believes that an employee, due to illness or injury, is unable to perform his/her normal work duties, the State may require the employee to submit to an independent medical examination..... b. The purpose of such independent medical evaluation is not to determine the degree of disability the employee has suffered, but rather as to whether illness or injuries sustained restrict the employee from performing the full range of his/her normal work assignment."]; 29 C.F.R. Pt. 1630 App. §1630.14(c) (interpreting the business necessity exception) ["This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential function of his or her job."]

10. Respondents also fail to find any textual support whatsoever in *Rutherford* for petitioner's contention that the Tenth Circuit "expressly acknowledges the applicability of the warrant requirement to medical testing of government employees." Petition at 7. To the contrary, the Tenth Circuit analysis relies on an application of the

authorized by this Court in numerous prior decisions to the facts of the case at bar and, unexceptionably, reached different conclusions. Petitioner mistakes these differing conclusions for differing analyses. Her contentions notwithstanding, this fact-specific application of a standard balancing test simply does not rise to the level of a conflict between circuits.

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balancing test, not a warrant requirement.

## CONCLUSION

In summary, respondents contend that this action fails to meet this Court's criteria for granting review. The case presents no important issues for this Court to resolve either as a matter of statutory or of constitutional interpretation. The petition for review should be denied.

Dated: January 8, 1997.

Respectfully submitted,

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